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Supreme Court of the United States

October Term, 1977

Supreme Court, U. S.
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RECORD NO. 78-479

STANLEY D. EDMONDS,
Petitioner,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE,
Respondent.

BRIEF FOR THE PETITIONER

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STANLEY D. EDMONDS, Petitioner,

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TRANSATLANTIQUE, Respondent.

BRIEF FOR THE PETITIONER

OPINIONS DELIVERED IN THE COURTS BELOW:

Petitioner, a longshoreman, received benefits under the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. for injuries received aboard defendant's vessel. Additionally he brought the instant suit against the defendant vessel owner for negligence. That suit was tried with a jury in the United

States District Court for the Eastern Distict of Virginia, Norfolk Division, before the Honorable Richard B. Kellam, District Judge on March 6th, 7th and 10th, 1975. A verdict in the amount of $97,500.00 was rendered against the vessel owner (by Order dated September 3, 1975). The Court set aside the verdict and ordered a new trial.

On December 16, 1975, a new trial with a jury was had before the Honorable John A. McKenzie, District Judge, and a verdict was returned against the vessel owner in the amount of $100,000.00. The amount of the verdict was reduced to $90,000.00 on the finding of 10% contributory fault of the plaintiff, and judgment was entered in that amount by Order dated March 3, 1976. The matter was appealed by defendant in the District Court to the Court of Appeals for the Fourth Circuit. A panel of the Fourth

Circuit in an Opinion dated May 6, 1977 limited the vessel owner's liability to "the extent of its fault, in this case $20,000.00." 558 F2d at 189; App. at p. 26. Rehearing en banc was granted on June 3, 1977. The en banc decision of the Fourth Circuit, decided June 22, 1978, reversed the District Court's entry of judgment in the amount of $90,000.00 and remanded the case for entry of judgment against the shipowner for $20,000.00 and for further deliberation on the distribution of $20,000.00 between the longshoreman and the stevedore. All pertinent opinions are included in the Appendix to the Petition for Certiorari.

JURISDICTION

The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari

is 28 U.S.C. Section 1254 (1).

The date of the Judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed is June 22, 1978. That decision was the result of the Fourth Circuit's en banc rehearing of the decision rendered May 6, 1977, by a panel of that court. No rehearing of the June 22, 1978 decision has been requested and no extension of time has been requested.

STATUTORY PROVISIONS

33 U.S.C. Section 905:

> Sec. 5.(a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as

required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing

> stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

QUESTION PRESENTED

1. Does 33 U.S.C. Section 905(b), as amended in 1972, permit a reduction in a vessel owner's liability to an injured longshoreman where the vessel owner's negligence is joined by concurring negligence on the part of the longshoreman and his stevedore employer?

STATEMENT OF THE CASE

Stanley Edmonds was employed by Nacirema Operating Company, a stevedoring company, as a longshoreman to assist in the unloading of the vessel

SS ATLANTIC COGNAC, owned by the defendant Compagnie Generale Transatlantique, while the vessel was docked at Portsmouth Marine Terminals, Portsmouth, Virginia, on March 3, 1974. While performing his duties Edmonds sustained serious and permanent injuries when a container which he was behind rolled back, crushing him against the bulkhead of the vessel. A mate employed by the vessel had ordered Edmonds behind the container to remove a jack which had been placed there for stability during the voyage from Europe. A "hustler" operated by a fellow longshoreman, in clear view of the mate, had at approximately the same time circled in the hold of the vessel and backed into the container causing it to roll back on Edmonds. The air brakes on the container were inoperable because a pet cock had been left open apparently when the container was loaded

on the vessel in Rotterdam. Jurisdiction in the court of first instance, the United States District Court for the Eastern District of Virginia existed by virtue of Title 28, U.S.C.A. 1332 on the grounds of diversity of citizenship and the amount in controversy.

SUMMARY OF ARGUMENT

Prior to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, a longshoreman could sue a third party vessel owner for negligence or unseaworthiness. The general common law doctrine of joint and several liability was applied in such cases, with the result that the longshoreman recovered his full damages from the jointly and severally liable vessel owner. The fact that a stevedore-employer may have been concurrently negligent did not serve to reduce the

amount a longshoreman could recover from the vessel owner.

In 1972, Congress, after long bargaining and negotiating, enacted substantial revisions to the Longshoremen's Act. The Amendments removed seaworthiness as a basis for vessel owner liability, but left intact the longshoreman's claim for negligence. Since the law previously permitted the longshoreman to recover his full damages from the vessel, and Congress did nothing to change that, full recovery by the longshoreman of his proven damages is still proper.

There is nothing in the statute itself or in the legislative history which abrogates the rule of joint and several liability. There is nothing in the statute which approves the concept of reducing the longshoreman's recovery where the stevedore employer is concurrently

negligent. The purported inconsistency in Section 905(b) of the Act alluded to by the Fourth Circuit does not exist. That section merely creates in longshoremen employed directly by the ship the same right to sue the vessel owner for negligence as is enjoyed by longshoremen employed by stevedoring companies.

The Court is dealing here with a carefully constructed Congressional scheme which balanced various competing interests. The Court should not disrupt that delicate balance by creating a new remedy for the vessel owner. If any change in the Longshoremen's Act is necessary, that change should be made by the Congress.

ARGUMENT

Prior to the 1972 Amendments to the Longshoremen and Harbor Workers' Compensation Act, it was clear that the longshoreman could sue a third party vessel owner. And the longshoreman's recovery could be grounded upon either or both of two bases--unseaworthiness or negligence. Under this Court's decision in Seas Shipping Company v. Sieracki, 328 U.S. 25 (1946), a warranty of seaworthiness ran to a longshoreman from a vessel owner. The vessel owner would be liable to the longshoreman for damages resulting from a breach of that warranty of seaworthiness. There was also a cause of action against the vessel owner for negligence at common law, which was specifically recognized in the Longshoremen's Act, even in the pre-1972 days. If the longshoreman successfully

proved unseaworthiness or negligence by the vessel owner, the plaintiff longshoreman recovered his full damages from that third party defendant.

The common law permitted a plaintiff to recover his full damages from any joint tort feasor. The general common law rule is that joint tort feasors are jointly and severally liable for the whole of any damages caused. Hence, a tort jointly committed by several tort feasors may be treated as joint or several at the election of the agrieved party. 74 Am Jur. 2d, Torts Section 61. Thus one who was injured by the wrongful act of two or more joint tort feasors had the option to sue each such tort feasor separately, or to join any number less than the whole, or to join them all as parties defendant in the single action. Id., Section 71. Prosser, The Handbook of the Law of Torts, Section 47,

(4th Edition 1971). Moreover, the fact that one joint tort feasor is protected from liability does not relieve the other non-protected joint tort feasor from liability to the person who has been harmed. 74 Am Jur. 2d, Torts, Section 69. The Restatement of Torts, Section 880 provides, "Where two persons would otherwise be liable for a harm, one of them is not relieved from liability by the fact that the other has an absolute privilege to act or an immunity from liability to the persons harmed."

The courts applied these common law principles to the third party suit available to an injured longshoreman. The courts recognized that a longshoreman could not bring suit against his employer because the employer was protected from suit by the provisions of the Longshoremen's Act. However, where a third party had caused injury to a longshoreman,

even if the stevedore employer had been concurrently negligent, the courts permitted full recovery by the longshoreman of all his proven damages. The courts followed the general principles of joint and several liability as known at common law.

This Court in Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation, 342 U.S. 382 (1952), refused to permit a third party vessel owner to recover from the employer a percentage of the damages the vessel was required to pay to a longshoreman, where the employer had been concurrently negligent. The court noted that it was the rule at common law that in the absence of legislation to the contrary, there was no right of contribution between joint tort feasors. This court later extended that rule further in the case of Pope and Talbot Inc. v. Hawn, 346 U.S. 406

(1953). This court refused to permit a reduction in the vessel's liability by the amount of compensation payments made to the longshoreman by the stevedore employer, where the stevedore has been concurrently negligent. The court characterized any such reduction in the vessel's favor as the substantial equivalent of contribution, which the court had declined to require in Halcyon.

This court did not leave the vessel owner without recourse, however. In Ryan Stevedoring Company v. Pan Atlantic Steamship Corporation, 350 U.S. 124 (1956), the court permitted the vessel owner to recover over against the stevedore employer for damages it had to pay the longshoreman, based upon a breach of the stevedore's implied warranty of workmanlike performance. Thus, the situation existing prior to the 1972 Amendments was this: A longshoreman

could receive from his employer the relatively low compensation benefits provided under the Act and could bring a suit against the third party vessel owner grounded in either unseaworthiness or negligence. The vessel owner could in turn claim against the stevedore employer for breach of the implied warranty of workmanlike performance. In short, the ultimate liability for injuries to the longshoreman rested upon the stevedore employer, both in the form of compensation payments and in damages. But the longshoreman, in his third party action, recovered his full proven damages. The law did not reduce the longshoreman's damages on account of concurrent stevedore negligence. The courts followed the general common law rule of joint and several liability.

However, in 1972 Congress undertook a major revision of the Longshoremen's

Act. It is therefore appropriate to consider precisely what Congress had in mind when enacting the 1972 Amendments. There were certain specific concerns which Congress addressed in 1972. Congress was clearly concerned that the level of workmen's compensation benefits payable under the Act was far too low. Yet Congress recognized that employer's were not eager to increase those benefits while the employers bore the ultimate cost of the litigation which ensued under Sieracki and Ryan. Congress recognized the financial burden this created for employers. Congress was specifically concerned that these three party law suits expended stevedore resources and crowded court dockets, yet resulted in little actual benefits to injured workers. Senate Report No. 92-1125, 92d Cong. 2d Sess. 4, 9.

At the same time, Congress recognized

that longshoring was a high risk occupation, with an injury frequency rate far above the average for manufacturing operations. Id. at 2. The Congress clearly desired to reduce that excessive injury rate. As the Senate Report stated,

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land based person in providing a safe place to work. Thus, nothing in this bill is intended to deregate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." Id. at 10.

In enacting the 1972 Amendments Congress received input from representatives of employers, from stevedore employers, and from shipowners and other third parties. The legislation that resulted was a careful compromise between these competing interests. As

Judge Van Dusen accurately noted in his concurring opinion in Marant v. Farrell Lines, 550 F2d 142 (3d Cir. 1977),

> "It is clear that Congress gave careful thought to the statutory scheme of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) and the changes in that scheme brought about by the enactment P.L. 92-576 in 1972. Both Houses of Congress held extensive hearings on proposed bills incorporating different changes, see Hearings on S. 2318, S. 525, S. 1547 Before the Sub. Comm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. (1972), Hearings on H.R. 247 H.R. 3505 H.R. 12006, H.R. 15023 before the Sub. Comm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. (1972), and both Houses wrote extensive committee reports to explain the purpose underlying P.L. 92-576, see S.Rep. No. 1125, 92d Cong. 2d Sess. (1972), H. Rep. No. 1441, 92d Cong. 2d Sess. (1972). See also comment, Negligence Standards under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Examining the Viewpoints, 21 Vill L.Rev. 244 (1975-1976)."

Id. at 147-48, n.1.

The Senate Report to the 1972 Amendments demonstrates this Congressional intention to create a comprehensive scheme for covered employees to provide adequate financial benefits, preserve employers' resources to fund those benefits, and encourage safety in the industry. As the Senate Report summarized,

> "The Bill reported by the Committee meets these objections by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and by outlawing indemnification actions and 'hold harmless' or indemnity agreements. It continues to allow suits against vessels or other third parties for negligence. At the same time, it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support would be payments under the Act." S. Rep. at 5.

In other words, Congress exacted a quid pro quo from each of the parties.

Longshoremen gave up the right to recover for unseaworthiness, proof of which was relatively easy under applicable case law. The longshoreman retained the right to sue the vessel for negligence under Section 905(b). In return, Congress protected the longshoreman with greatly increased compensation benefits from the employer.

The shipowner gave up the right to recover over from the stevedore under theories of indemnity or warranty for damages awarded to a longshoreman. In return, Congress protected the shipowner from suit by the longshoreman based upon unseaworthiness. The vessel could be held liable to the longshoreman only for negligence.

The stevedore gave up the low compensation benefits structure and was required to make weekly payments to longshoremen more in keeping with actual

earnings of injured workers. In return, Congress protected the stevedore from any recovery over by the vessel owner under indemnity, warranty, or any other theory. This carefully constructed scheme provided additional benefits for each interested party and created additional protections for each party. As is usually the case in a political compromise, each side gained something and each side gave up something. The interest of each had been balanced in the legislative process.

However, aside from the changes undertaken by the 1972 Amendments, Congress left the other statutory provisions and court interpretations intact. In short, if Congress did not change the previously followed rule of joint and several liability, then we can presume Congress intended that that rule continue in force and effect. Thus, the

question for this Court to decide is, what did Congress intend with regard to the longshoreman's third party suit. Did Congress intend to reduce a vessel owner's liability to an injured longshoreman where the vessel owner's negligence is joined by concurrent negligence of the stevedore employer?

In determining what Congress intended regarding the longshoreman's third party suit, this Court must bear in mind the remedial purpose of the Longshoremen's Act. The Act is to be "liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results." Voris v. Eikel, 346 U.S. 328 (1953); Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977)

Moreover, it is a rule of statutory construction that statutes in

derogation of the common law are to be strictly construed. As this Court said in Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952),

> "Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."

In Isbrandtsen, the Court went on to add that "maritime legislation. . . should be construed to make effective its design to change the general maritime law so as to improve the lot of seamen." Id. Similarly, in construing the 1972 Amendments, any construction which alters the common law to the disadvantage of longshoremen should not be favored.

Petitioner submits that the Longshoremen's Act permits the injured longshoreman to recover his full damages where he is injured due to the negligence of the

vessel, according to common law principles of joint and severable liability. Petitioner submits that any attempt to reduce the injured longshoreman's damages because the stevedore employer may also have been at fault is contrary to the Longshoremen's Act, contrary to the intent of Congress, contrary this Court's prior decisions, contrary to the common law, contrary to the Restatement of Judgments, and contrary to the decisions of the Second, Fifth and Ninth Circuits. In the Second Circuit, see Landon v. Lief Hoegh and Co., Inc., 521 F2d 756 (1975), cert. denied, 423 U.S. 1053 (1976); Zapico v. Bucyrus Co., 579 F2d 714 (1978). In the Fifth Circuit, see Samuels v. Empresa Lineas Maritimas Argentinas, 573 F2d 884 (1978); Howard v. Romen, 442 F.Supp. 1142 (S.D. Ala. 1977). See also Albert v. Paulo, 552 F2d 1139 (1977). In the Ninth Circuit,

see Dodge v. Mitsui Shintaku Ginko K.K., 528 F2d 669 (1975), cert. denied, 425 U.S. 944 (1976); Shellman v. United States Lines, Inc., 528 F2d 675 (1975), cert. denied, 425 U.S. 936 (1976); Hubbard v. Great Pacific Shipping Co., Monrovia, 404 F.Supp. 1242 (D. Ore. 1975). See also Lucas v. "Brinknes" Schiffahrts Ges., 379 F.Supp. 759 (E.D. Pa. 1974); Shepler v. Weyerhaeuser Co., 569 P2d 1040 (Ore. 1977).

Despite the contrary authority, petitioner here was held to be entitled to recover only $20,000 of his $100,000 jury verdict against the third party vessel owner. That jury verdict was reduced by the degree of contributory fault of the longshoreman himself (here 10%), resulting in a final verdict of $90,000. However, in the Fourth Circuit Opinion here under review, because the vessel was 20% at fault and the stevedore

70% at fault, the shipowner was held to be liable only for 20% of the amount of damages found by the jury. The Fourth Circuit, though recognizing that its opinion conflicted with the decisions of other circuit courts, nevertheless concluded that the longshoreman could recover only that percentage of his damages which matches the ship's percentage of negligence.

The Fourth Circuit based its conclusion largely on a purported internal conflict in the language of Section 905(b). The first sentence of that Section says that if the longshoreman's injuries are caused by the negligence of the vessel then the longshoreman may recover.

> "In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or any one otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the

provisions of Section 33
of this Act. . .."

The second sentence of Sub-Section 905(b) says that if the vessel itself employed the longshoreman, he may not recover if the injury was caused by the negligence of persons providing stevedoring services. "If such persons was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel."

The Fourth Circuit construes this language to mean that if there is negligence by those persons providing stevedoring services (longshoremen), a vessel-employed longshoreman may not recover. From this the Fourth Circuit then concludes that Congress intended to provide for liability on the ship-

owner only to the extent its fault contributed to the injury, while insulating the vessel from liability to the extent the stevedore's fault contributed to the accident.

Petitioner submits that there is absolutely no internal inconsistency in Section 905(b). The language of the second sentence in Section 905(b) is merely designed to cover the unusual situation where the vessel owner employs the longshoreman directly. Normally, longshoremen are employed by a stevedoring company, which in turn contracts to perform longshoring work for a vessel owner. Where the vessel owner employs the longshoreman directly, the vessel owner is then an employer under the Act. For, as Section 2(4) of the Act provides,

> "The term 'employer' means an employer any of whose employees are employed in whole or in part upon the navigable waters of the United

> States (including any adjoining pier, wharf, dry dock, terminal, buildingway, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building of vessel)".

A vessel owner who employs longshoremen directly would then be liable for compensation payments under the Act. The exclusive remedy provision of Section 5 of the Act protects an employer from suit by an employee for on the job injuries. But it was not the intent of Congress to insulate a vessel owner from suit by longshoremen injured aboard his vessel. Therefore, in the unusual case where the vessel directly employs the longshoreman, this Court has permitted suit against that vessel owner as a vessel owner. Reed v. SS YAKA, 373 U.S. 410 (1963); Jackson v. Lykes Bros. Steamship Co., 386 U.S. 371 (1967). However, the second sentence of Section 905(b)

provides that such a vessel-employed longshoreman may not base his claim for damages against the ship on the negligence of others engaged in providing stevedoring services to the vessel. As Judge Hall points out in his Edmonds dissent, "The second sentence is not in conflict with the first, but simply says that the plaintiff may not base his claim against the shipowner upon the negligence of the stevedore." App. to Pet. for Cert. A64-A65. This is clearly the intention of Congress. Congress meant to provide to all longshoremen the same third party negligence suit against vessel owners, whether the longshoreman was employed by a stevedore company or by the vessel directly. The second sentence of Section 905(b) is only meant to provide for that equality. The Senate Report makes that abundantly clear when it says:

> "Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to shipbuilding or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoreman or shipbuilders or repairmen as apply when an independent contractor employs such persons." S. Rep. at 11-12.

This Congressional intent was followed by the Third Circuit in Griffith v. Wheeling Pittsburgh Steel Company, 521 F2d 31 (3d Cir. 1975). The Court there concluded,

> "The vessel, even a vessel which is an employer under the Act, is relieved of liability for negligence of persons engaged in providing stevedoring services, but is not relieved of liability for its own 'owner' occasioned negligence." Id. at 43.

The result intended by Congress

is clear. Where a shipowner employs its own longshoremen, that shipowner functions as an employer under the Act. As such, that shipowner is liable for compensation payments under that Act. Yet, the longshoreman employed directly by that shipowner retains his right against the shipowner to sue for negligence of the vessel. What Congress did in the second sentence of Section 905(b) was insure that that longshoreman could recover only for the negligence of the shipowner as a shipowner. Negligence of the shipowner as a stevedore would not be a ground for recovery. The same result obtains where a shipowner employs a stevedoring company; if the accident was caused by the stevedore, the vessel would be neither negligent nor liable. Landon v. Lief Hoegh & Co., Inc., 521 F2d at 763.

Part of the difficulty in

interpreting Section 905(b) is caused by the fact that Congress phrased the second sentence of that section in the negative rather than in the positive. If Congress had simply phrased the second and third sentences of Section 905(b) in the affirmative, as it did the first sentence, the lack of inconsistency would be manifest. If stated affirmatively, the second sentence of Section 905(b) would read:

> "If such persons was employed by the vessel to provide stevedoring services, then an action shall be permitted if the injury was caused by the negligence of persons not engaged in providing stevedoring services to the vessel."

It is surely no different where Congress has said instead, as the second sentence of Section 905(b) actually reads:

> "If such persons was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by

> the negligence of persons engaged in providing stevedoring services to the vessel."

Thus, the Fourth Circuit's effort to support a theory of reducing a longshoreman's damages on account of stevedore negligence cannot find support in the language of Section 905(b).

The Fourth Circuit also supported its conclusion by reference to this Court's opinion in United States v. Reliable Transfer Company, 421 U.S. 397 (1975). The Fourth Circuit relied on a "trend" towards expansion of the doctrine of comparative negligence, as evidenced by the application of comparative negligence in Reliable Transfer. Apparently the Fourth Circuit believed it was applying comparative negligence by reducing the longshoreman's recovery by the amount of concurrent stevedore negligence. Such an interpretation

finds no support in the legislative history of the Act. The only mention of comparative negligence in the legislative history is the statement that, "The Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to cause him the injury." S. Rep. at 12. That language clearly applies comparative negligence only to the question of the plaintiff longshoreman's own fault. Nowhere does the legislative history suggest that the negligence of the stevedore be applied in some fashion to reduce the longshoreman's recovery.

The Fourth Circuit's reliance on Reliable Transfer is a misplaced effort to view the issue in this case solely as a question of admiralty law. This Court

recognized in Reliable Transfer that in maritime law the judiciary has traditionally taken the lead in formulating flexible and fair remedies. 421 U.S. at 409. The vessel owner in the instant matter, and the Fourth Circuit in its opinion, urge as well that it is appropriate for the judiciary to fashion a remedy dealing with longshoremen's third party negligence suits, which reduces the vessel owner's liability to the longshoreman by the amount of concurrent stevedore negligence. The Court in Reliable Transfer recognized that no statutory or judicial precept precluded a change in the rule of divided damages. Id. In the instant matter, however, there is a very carefully constructed statutory scheme, the result of long hours of bargaining and compromise in the Congress. The language in the legislative history leads to the

conclusion that Congress did not intend to reduce the longshoreman's damages where the stevedore was concurrently negligent. Rather, the statute envisions full recovery by a longshoreman for all damages caused by the vessel.

Congress acted to remove from the longshoreman one of the bases for recovery from the shipowner, that is, unseaworthiness. The other basis for recovery, negligence, was left intact. Where a basis for recovery remains, the rules governing the amount of the longshoreman's recovery have not been changed by the Amendments. Congress did not repeal the doctrine of joint and several liability. Accordingly, where there is liability on the shipowner, full recovery of the longshoreman's damages must follow.

This Court long ago established the judicial precept that under the

Longshoremen's Act, reduction of the vessel owner's liability to the longshoreman on account of some stevedore negligence was not required. This rule, created in Halcyon, and refined in Pope and Talbot, has recently been reaffirmed by this Court. In Cooper Stevedoring Co. v. Kopke, 417 U.S. 106 (1974), this Court did allow contribution by a non-employer joint tort feasor. However, the Court took care to explain that where an employer is shielded by the Longshoremen's Act, contribution by the employer would be precluded. As the Court noted, "Halcyon was, and still is, good law on its facts." Id. at 115. See also Atlantic Coast Line R.R. v. Erie Lackawanna R.Co., 406 U.S. 340 (1972). For this Court to approve the fashioning of a remedy in the nature of that devised by the Fourth Circuit goes far

beyond Reliable Transfer. Reliable Transfer overruled a discredited judicial doctrine and brought United States Maritime Law into conformity with the rest of the world, but the Fourth Circuit opinion here flies in the face of the legislative history and of prior Supreme Court holdings, and rejects the general common law rule of joint and several liability.

The Fourth Circuit's remedy also has severe adverse effects on the longshoreman. Instead of being made whole by the combination of compensation benefits paid without fault and damages paid on account of third party negligence, the longshoreman would receive only part of his jury approved damages. But still he must repay the compensation received from the employer, pursuant to Section 33 of the Act. See also Federal Marine Terminals, Inc., v.

Burnside Shipping Co., 394 U.S. 404 (1969).

In short, it is the injured longshoreman who bears the brunt of the inequities of the Fourth Circuit's remedy. In view of the requirements that the Act be liberally construed in favor of the longshoreman and in such a way as to avoid harsh and incongruous results, Voris, supra; Northeast Marine Terminal, supra, the Fourth Circuit decision is particularly inappropriate. It is precisely because of this harsh inequity worked upon the longshoreman--the party least able to bear the inequity and the party most free from fault--that other courts have refused to reduce the longshoreman's damages on account of employer negligence. The following language from Santino v. Liberian Distance Transports Inc., 405 F.Supp. 34, 35 (W.D. Wash. 1975), quoted with

approval in Shellman, 528 F2d at 680, is instructive. The Court said:

> "Permitting a shipowner to plead the negligence of the stevedore as an affirmative defense would not eliminate inequity. It would shift the inequity from shipowner to injured longshoreman. He would be restricted in his recovery as against the shipowner without acquiring any offsetting rights under the Act as against the stevedore employer."

It is surely in keeping with the humanitarian purposes of the Act to permit the longshoreman to be made whole by recovery of the full amount of his damages.

Finally, it was the intention of Congress in the Amendments to abolish the circuitous third party suits of pre-1972 days. Congressional displeasure with the dissipation of stevedore resources in the circuitous third party suits was clear. S.Rep. at 4, 9.

Congress intended that the resources of the stevedore employer be husbanded for use in providing benefits to injured workers. Thus, Congress acted to keep stevedores out of any third party litigation by precluding any kind of recovery over by the shipowner. However, the effect of the Fourth Circuit's remedy is to bring the employer back into the negligence action. The employer must participate directly in the longshoreman's suit, or he will jeopardize his opportunity to recover the compensation payments he has made under the Act. For if the stevedore's concurrent negligence reduces the longshoreman's recovery, there will be less of a verdict available to repay the "compensation lien" of the stevedore. Petitioner submits that, as the Second Circuit concluded in Zapico v. Bucyrus-Erie Company, 579 F2d 714 (1978),

impairment of the stevedore's compensation lien is also the substantial equivalent of contribution.

Congress simply did not envision the stevedore having to participate in third party suits to prove his own freedom from fault. No such language can be found in either the statute or the legislative history. Yet the clear result of the Fourth Circuit decision is to bring the stevedore back into the litigation. In the case at bar, for example, the shipowner has paid the amount of the verdict, as assessed by the Fourth Circuit, into the district court and has interpleaded the employer/carrier, and longshoreman, who must now litigate the question of how the damages are to be divided. Compagnie Generale Transatlantique v. Edmonds, et al., C.A. No. 78-413-N (E.D. Va.). Obviously, such additional legal

involvement by the stevedore further dissipates stevedore resources and resurects the three party entanglement of pre-1972 days. If that development is approved by this Court, then Congress will have legislated in vain. The stevedore will be right back where he was prior to 1972. He will be paying compensation benefits (at greatly increased rates,) and he will be participating in the third party suits in an effort to safeguard his compensation lien.

The longshoreman, on the other hand, has given up his seaworthiness remedy under the Amendments, and under the Fourth Circuit interpretation he will also have lost his negligence action against the shipowner, as it existed prior to the Amendments. His judicially amended negligence remedy will permit him recovery only of the

amount that the shipowner's negligence contributed to the accident. The result is that the longshoreman will bear a burden borne by no other plaintiff under maritime or land based law. Plaintiff longshoreman must not only be prepared to show his own freedom from contributory fault, he must also show the freedom from fault of the non-party employer. However, Congress intended that the longshoreman be in the same position as a shore based worker insofar as third party suits are concerned. As the Senate Report says, "The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land. . .." S. Rep. at 11. If that Committee language means anything, it means that the

longshoreman should not be penalized for being injured aboard a vessel by imposing this additional burden on him. The Fourth Circuit's remedy clearly violates the expressed intent of Congress by placing the plaintiff longshoreman in a uniquely disadvantaged position.

It is important to remember that the Court here is involved in a question of statutory interpretation. The statute in question was the result of a long negotiating process involving representatives of workers, employers, and third parties. It is quite clear that the result is a politically balanced statute. This Court must be very careful before making any judicial revisions in such a creation of the Congress. This Court is called upon to interpret the statute as enacted by Congress; it is for Congress to alter or amend the

Act if that be necessary. If the vessel owner is dissatisfied with the statute and is dissatisfied with the fact that decisional law both prior to and subsequent to the Amendments has required payment of full damages by a concurrently negligent shipowner, then the Congress is the proper forum before which the shipowner should seek redress. This Court has previously recognized its limited authority to rewrite the Longshoremen's Act. Halcyon, 342 U.S., at 287. Other lower courts which have considered the instant question have also suggested that Congress, not the courts, should untertake any change necessary. See Shellman, 528 F2d at 680; Marant, 550 F2d at 551-52 (Van Dusen J., concurring); Santino, 405 F.Supp. at 35; Solsvik v. Maremar Compania Naviera, S.A., 399 F.Supp. 712, 714 (W.D. Wash. 1975). Therefore, the

Fourth Circuit remedy is inappropriate and requires reversal by this Court.

CONCLUSION

Wherefore, for the reasons set forth herein, petitioner prays this Court to reverse the En Banc split decision of the Court of Appeals for the Fourth Circuit and to enter judgment in favor of the petitioner for $90,000.00.

RESPECTFULLY SUBMITTED,

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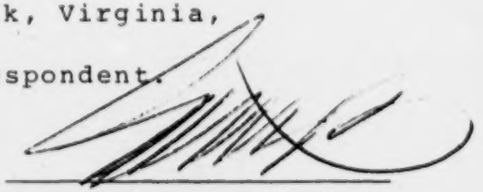
CERTIFICATE OF SERVICE

I, Calvin W. Breit, certify that on or before the 21st day of December, 1978, I mailed, postage prepaid, 40 copies of this Brief for the Petitioner to the Clerk, U.S. Supreme Court, and mailed 3 copies, postage prepaid, to Charles F. Tucker, Vandeventer, Black, Meredith and Martin, One Commercial Place, Virginia National Bank Bldg., Norfolk, Virginia, counsel for the respondent.



CERTIFICATE OF SERVICE

I, Calvin W. Breit, certify that on or before the day of December, 1978, I mailed, postage prepaid, 40 copies of this Brief for the Petitioner to the Clerk, U.S. Supreme Court, and mailed 3 copies, postage prepaid, to Charles F. Tucker, Vandeventer, Black, Meredith and Martin, One Commercial Place, Virginia National Bank Bldg., Norfolk, Virginia, counsel for the respondent, Thomas D. Wilcox, Esquire, 919 Eighteenth Street, Washington, D.C. 20006, Attorney for Amicus Curiae National Association of Stevedores; Paul S. Edelman, Esquire, 99 Park Avenue, New York, New York 10016, Attorney for Amicus Curiae American Trial Lawyers Association; Randall C. Coleman, Esquire, 1600 Maryland National Bank Bldg., Baltimore, Maryland 21202, Attorney for Amicus Curiae American Export Lines,

Inc., et al.; Graydon S. Staring, Esquire, Two Embarcadero Center, San Francisco, California 94111, Attorney for Amicus Curiae Pacific Merchant Shipping Association; and 5 copies of the Brief to David R. Owen, 10 Light Street, Baltimore, Maryland 21202, Attorney for Amicus Curiae Liberty Mutual Insurance Company.

An additional ten (10) day period for making changes required by the Clerk was permitted by the Clerk on December 21, 1978.